



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 820 OF 2018

MAURICE ADONGO ANYANGO.....CLAIMANT

VERSUS

KENYATTA INTERNATIONAL

CONFERENCE CENTERRESPONDENT

RULING

1. This Court delivered judgment on 17.1.2020, awarding the Claimant KShs. 1,457,643.45 as compensation for unfair termination together with costs and interest. The Respondent was dissatisfied with the decision and preferred an appeal by lodging a notice of Appeal. She also filed the Notice of Motion dated 19.2.2020 seeking for an order of stay of execution of the judgment pending the hearing and determination of the application and the intended appeal.
2. The application is supported by the grounds set out therein and the Supporting Affidavit of Maureen Chogo-Chahale sworn on 19.2.2020, and it was opposed by the Claimant/Respondent vide his Replying Affidavit sworn on 3.3.2020.
3. In brief, the Applicant averred that she filed a Notice of Appeal against the said judgment and requested for certified copies of typed proceedings, judgment and decree; that the intended appeal has reasonable chances of success and it will be rendered nugatory if execution is done; that she stands to suffer a substantial loss if the stay order sought is not granted as there was the danger of not recovering the decretal sum after paying the claimant; and finally he contended that the application was made with no delay.
4. On the other hand, the Claimant contended that his bill of costs has not yet been taxed to pave the way for execution and as such, the application for stay is premature and an abuse of the process of the court; that the applicant has not demonstrated that she has an arguable appeal; that the applicant has not demonstrated how any loss or how she will be prejudiced if the application is disallowed; and that the applicant should be stopped from frustrating him from enjoying his judgment by having the application dismissed with costs.
5. The Application was disposed of by way of written submissions with both parties filing their submissions.

The Applicant's Submissions

6. The Applicant submitted that the purpose of stay of execution orders was to preserve the subject matter so that an appeal would not be rendered nugatory. She therefore contended that she would suffer substantial loss if the orders sought were not granted, in the event the intended appeal was successful and the Claimant is unable to refund the decretal sum.
7. She further contended that the Claimant made no disclosure in his Replying Affidavit of his sources of income, hence had failed to discharge the evidential burden of showing the resources he had to refund to her in the event her appeal succeeding. She relied on ***Focin Motorcycle Company Limited vs. Ann Wangui Wambui & Another [2018] eKLR*** and ***Kenya Hotel Properties Limited vs. Willesden Properties Limited Civil Application NAI 322 of 2006*** where it was held that once the applicant expresses that the respondent would be unable to repay the decretal sum, the evidential burden shifts to the respondent to show resources since that is a matter peculiarly within his knowledge.
8. The Applicant submitted that she has already deposited in Court, the entire decretal sum to act as security for the due performance of the decree as directed by the court, and as such, the Claimant's interests are well taken care of. For emphasis she relied on the case ***G.N. Muema P/A (Sic) Mt View Maternity & Nursing Home vs. Miriam Maalim Bishar & Another [2018] eKLR*** and ***Focin Motorcycle Co. Limited [Supra]*** and urged the Court to grant the orders prayed.

The Claimant/Respondent's Submissions

9. The Claimant submitted that the Applicant has failed to demonstrate that she has an arguable appeal and that she would suffer substantial loss if stay order is declined. According to him the applicant only made generalized statement but failed to demonstrate that she had a sufficient cause or reasons to warrant grant of stay as required by order 44 rule 6 of the Civil Procedure Rules 2010. Therefore, she prayed for the application to be dismissed with costs.

10. For emphasis, the Claimant/Respondent relied on the case of **Butt vs. Rent Restriction Tribunal [1982] KLR 417** where it was held that a judge should not refuse an order for stay where there are good reasons.

Issues for determination and analysis

11. After considering the application, the rival affidavits and written submissions, it is my view that the only issue for determination is whether the application has met the legal threshold for granting stay pending appeal by the trial court.

12. Order 42 rule 6(2) of the Civil Procedure Rules bars the trial Court from ordering stay of execution pending appeal unless–

- a. The application is brought without inordinate delay.
- b. The Applicant demonstrates that he will suffer substantial loss unless stay is ordered; and
- c. The applicant is willing to give security as the court may order.

13. The Application was filed on 20.2.2020 whereas the judgment was delivered on 17.1.2020. Consequently, I find that the application was made without any delay.

14. As regards the issue of substantial loss, the applicant has alleged in the supporting affidavit that if the decreed sum is paid out to the claimant, he will not be able to repay her should the intended appeal succeed, and as such the appeal will be rendered nugatory. In **National Industrial Credit Bank Limited –V- Aquinas Francis Wasike and Another [2006] e KLR**, the court held that-

“This court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by a respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly, within his knowledge.”

15. In this case, the claimant did not state whether he is a man of means leave alone disclosing any resource that he would use to repay the decretal sum should the intended appeal succeed after execution of the impugned judgment. Consequently, I find that the claimant has failed to rebut the allegation by the applicant that he would not be able to repay the decretal sum if the appeal succeeds after the money is paid to him in execution of the impugned judgment.

16. Finally, the applicant has demonstrated the willingness to offer security by depositing the entire decretal sum in court as directed by the Duty Judge on 20.2.2020. The said deposit protects the interests of the claimant and also guarantees the applicant’s right of appeal.

17. Having satisfied myself that the applicant has met the legal threshold for granting of a stay pending appeal, I allow the application dated 17.1.2020 on condition that the entire decretal sum deposited in court on the basis of the interim stay order dated 20.2.2020 remains in court as security pending the filing, hearing and determination of the intended appeal. For avoidance of doubt, if the appeal is not filed within 60 days of this ruling, the stay order herein will stand discharged automatically.

Dated, signed and delivered at Nairobi this 17th December 2020.

ONESMUS N MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE